REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

APPLICATION NO 58 OF 2018

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

LILIAN WANJA MUTHONI T/A SAHARA CONSULTANTS.....1ST RESPONDENT

LIDI HOLDINGS LIMITED.....2ND RESPONDENT

LIDI ESTTES LIMITED.....3RD RESPONDENT

STEPHANIE MARIGU MBOGO.....4TH RESPONDENT

SHEELA W. MBOGO.....5TH RESPONDENT

SHALOM MALAIKA KAMWETI.....6TH RESPONDENT

JUDGMENT

1. The applicant, the Assets Recovery Agency, is established under section 53 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA). It is a body corporate with the mandate of identifying, tracing, freezing and recovering proceeds of crime. Sections 81-89 of Part VIII of POCAMLA sets out the procedure for civil forfeiture. It authorizes the applicant to institute civil forfeiture proceedings and seek orders prohibiting any person, subject to such conditions as the court may specify, from dealing in any manner with any property if there are reasonable grounds to believe that such property is a proceed of crime. Section 90 authorises the applicant, where a preservation order is in force, to apply to the High Court for an order of forfeiture to the government of all or any of the property that is subject to the preservation order. This is what the applicant has done in this matter with respect to the respondents.

The Application

2. By the application dated 24th December 2018, the applicant seeks the following orders against the respondents:

> **1. THAT this Honourable Court be pleased to issue an order declaring that a Total of USD 105,293.7 and Kshs 22, 445, 487.74 held in Bank Accounts Numbers ****, ********, *******, ********, ********, ******, *******, **********, ******* and ******* in the name of LWMM/T/A Sahara Consultants, Lidi Holdings Limited, Lidi Estates Limited, SMM, SWM and SMK at Equity Bank Limited, Community Branch Nairobi and Diamond Trust Bank Limited, Capital Centre and Villages Market Branches are proceeds of crime and therefore liable for forfeiture to the State.**
>
> **2. THAT this Honourable Court be pleased to issue orders of forfeiture of the following funds;**
>
> > **i. USD 67, 331.9 held in account number ******** in the name of LWMM trading in the Business Name of Sahara Consultants held at Equity Bank Limited, Community Branch, Nairobi.**
> >
> > **ii. USD 28, 981.97 held in account number ********** in the name of LIDI Estates Limited held at Equity Bank Limited Community Branch, Nairobi.**

iii. Kshs 2,297,495.00 held in account number ******* in the name of LIDI Estates Limited held at Equity Bank Limited, Community Branch, Nairobi.**

iv. Kshs 257,220 held in account number ****** in the name of LIDI Holdings Limited held at Equity Bank Limited, Community Branch, Nairobi.**

v. USD 8,979.83 held in account number ****** in the name of LIDI Holdings Limited held at Equity Bank Limited Community Branch, Nairobi.**

vi. Kshs 1,685,430.84 held in account number ***** in the name of LWMM trading in the business name of Sahara Consultants held at Equity Bank Limited, Community, Branch Nairobi.**

vii. Kshs 5,653,431.89 held in account number ****** in the name LWMM trading in the Business Name Sahara Consultants held at Diamond Trust Bank Limited, Capital Centre Branch Nairobi.**

viii. Kshs 2, 903, 996.71 held in account number ** in the name of SMM held at Diamond Trust Bank Limited, Village Market Branch Nairobi.**

ix. Kshs 4, 788,763.59 held in account number **** in the name of SMK held at Diamond Trust Bank Limited, Village Market Branch, Nairobi.**

x. Kshs 4, 859,169.71 held in account number **** in the name of SWM held at Diamond Trust Bank Limited Capital Centre Branch, Limited.**

3. THAT this Honourable Court be pleased to issue an order that the above funds be forfeited to the Government and transferred to the Applicant.

4. THAT this Court do make any other ancillary orders it considers appropriate to facilitate the transfer of the property forfeited to the Government.

5. THAT costs be provided for.

3. The application is premised on sections 81, 90 and 92 of POCAMLA as read together with Order 51 of the Civil Procedure Rules. It is supported by an affidavit sworn by Senior Sergeant Fredrick Musyoki on the same date; an affidavit sworn by Cpl. Isaac Nakitare on 27th May 2019 and a supplementary affidavit also sworn by Cpl. Isaac Nakitare on 30th May 2019. The grounds on which the application is made are set out on the face of the application.

4. The application is brought against two corporate entities and four natural persons, the 1st respondent and her three daughters. According to the applicant, the 1st respondent is a resident of Kitisuru West Hotani Close, the River House within Nairobi. She is the holder of bank accounts at Equity Bank, Community Branch, Nairobi, account numbers ********,******and ******which hold funds amounting to USD 67, 331.9 and Kshs 7,338,862.73.

5. The 2nd respondent is a limited liability company whose directors are the 1st respondent and her husband, one Dick Achieng Oneko. The 2nd respondent is the holder of bank accounts numbers 0180273780412 and 0180273780467 held at Equity Bank, Community Branch, Nairobi, holding funds amounting to USD 8,979.83 and Kshs 257,220.

6. The 3rd respondent is a limited liability company whose directors are the 1st respondent and her husband, Dick Achieng Oneko and the 4th respondent, the 1st respondent's daughter, one Stephanie Marigu Mbogo. The 3rd respondent company is the holder of bank accounts numbers 0180273781178 and 0180273781104 held at Equity Bank Community Branch, Nairobi, holding funds amounting to USD 28,981.97 and Kshs 2, 297,495.

7. The 4th respondent, a daughter of the 1st respondent, is the holder of bank account number 5225803001 at Diamond Trust Bank Limited Village Market Branch Nairobi holding funds amounting to Kshs 2, 903, 996.71. The 5th respondent is a minor female, also a daughter of the 1st respondent. She is the holder of bank account number 7825846007 at Diamond Trust Bank Limited, Capital Centre Branch, Nairobi, holding a total of Kshs 4, 859,169.71. The 6th respondent is also a minor daughter of the 1st respondent. She is holder of bank account number 704174600, at Diamond Trust Bank Limited, Capital Centre Branch, Nairobi, holding Kshs 4, 788,763.59.

8. The facts giving rise to the application as set out in the application are that the 1st respondent, then the Principal Secretary in the Ministry of Public Service, Youth and Gender Affairs, staff and suppliers of the National Youth Service (NYS) were arrested and charged in court on 29th May 2018. They were charged with various offences, including abuse of office and conspiracy to commit a felony, among others. Following the arrest and arraignment in court, the applicant, in exercise of its mandate, started investigations to recover proceeds of crime. It then filed an application for preservation of assets premised on the investigations conducted by the Directorate of Criminal Investigations (DCI) into the theft of public funds amounting to Kshs 467,896,993/= from the NYS, a State Department in the Ministry of Public Service, Youth and Gender Affairs.

9. The investigations had revealed massive fraud and embezzlement of public funds perpetrated by public officials and private persons. Some of these persons have been charged with various offences in Nairobi Anti-Corruption Chief Magistrates' Court (Milimani) Criminal Case No.

ACC 8, 10, 12, 13, 16 and 17 of 2018. The investigations by the DCI revealed massive schemes of embezzlements of public funds, fraud and money laundering rendering such funds proceeds of crime liable for forfeiture under POCAMLA. The investigations further established that the funds were stolen or fraudulently transferred from the NYS to the bank accounts of various suppliers who fictitiously supplied goods and services that were not rendered to the NYS.

10. The applicant states that it had, on 26th April 2018, received information that there were funds held at Equity Bank, Community Branch, Nairobi, suspected to be proceeds of crime. Investigations revealed that the 1st respondent had opened and operates bank accounts in her name, her companies and business entities in her name and on behalf of her children. These accounts had received suspiciously large cash deposits in US dollars and Kenya shillings, and there were reasonable grounds to believe that the funds in question were part of the funds stolen from the NYS. Though given an opportunity to do so, the respondents had not given any reasonable explanation to prove any legitimate source of the funds. It was the applicant's case that the investigations have revealed that the cash deposits were unlawfully acquired and were therefore proceeds of crime as defined in POCAMLA.

11. The applicant notes, in particular, that there is no justifiable explanation from the respondents why the accounts of the children of the 1st respondent, some of whom are minors, are conducting huge suspicious cash transactions. It contends that there is reasonable ground to believe that the children's accounts are used as conduits for money laundering contrary to sections 3, 4 and 7 as read with section 16 of POCAMLA. The applicant believed that the accounts are holding funds suspected to be proceeds of crime which ought to be forfeited to the state. It had therefore, on 29th October 2018, obtained preservation orders against the funds in the said accounts. The preservation orders were gazetted on 9th November 2018 vide Gazette Notice No. 11570 pursuant to section 83(1) of POCAMLA.

12. The applicant's investigations had established that the funds are from illegitimate sources and part of the funds stolen from NYS. The funds had been acquired by the respondents and deposited in the above accounts owned, managed and run by the 1st respondent. The applicant contends that the cash transactions in the accounts were made between January 2016 and March 2018, the period the theft of fund from NYS occurred.

13. In the affidavit in support of the application, Senior Sergeant Fredrick Musyoki, a police officer attached to the applicant, echoes the grounds set out in the application relating to the arrest and arraignment in court and the subsequent investigations against the 1st respondent. He exhibits in evidence the charge sheet against the 1st respondent and others in Criminal Case Numbers ACC 8,10,12,13,16 and 17 of 2018 (annexure 'FM 1'). He had opened an inquiry file No. 15/2018 to investigate the allegations against the 1st respondent and on 30th May 2018 obtained orders ('FM 2') in Misc Criminal Application No. 1839/2018 authorising him to search, inspect, seize, freeze and preserve funds in the accounts the subject of this application.

14. On 7th September 2018, Musyoki had obtained orders ('FM 3') in High Court Misc. Application No. 36 of 2018 to investigate, inspect, freeze and preserve the above accounts for another period of 90 days. He had analyzed the statements of accounts and established that there were suspicious huge cash deposits, withdrawals and intra account transfers of funds within the accounts. Further investigations had established that the 1st respondent had other accounts held at Diamond Trust Bank Limited.

15. On 28th August 2018, vide Misc. Criminal Application No. 2814 of 2018, he had sought and obtained further orders ('FM 4') to examine the accounts held at Diamond Trust Bank in the names of Stephanie Marigu Mbogo (Account Number 525803001); Sheela W. Mbogo (Account Number 7825846007); Shalom Malaika Kamweti (Account Number 7041746001) and Lilian Muthoni Mbogo T/A Sahara Consultants (Account Number 0806061000). Freezing orders in respect of these accounts ('FM 5') were issued on 7th September 2018.

16. Musyoki had examined and analysed the account opening forms and statements in respect of the various accounts (FM 6 (a, b, c and d). He had noted that there were massive suspicious cash deposits, withdrawals and intra and inter transfers to accounts within the same banks and other banks. He had further noted that all the ten (10) accounts were opened and operated by the 1st respondent on her behalf and on behalf of her children, some of whom were or are minors. All the ten accounts had received suspicious huge cash deposits that indicates activities of money laundering, especially for the periods 2016, 2017 and 2018. He set out these suspicious transactions culled from the analysis of the statements (annexures 'FM 7 (a to j)) as being the following:

1. USD account no. 0180272692383 in the name of Lilian Wanja Muthoni Mbogo T/A Sahara Consultants held at Equity Bank Limited Community Branch, Nairobi received suspicious cash deposits of USD 79,000 on diverse dates as follows:

i. 11th May 2017 USD 10,000.

ii. 6th July 2017 USD 9,000.

iii. 2nd August 2017 USD 40,000.

iv. 7th August 2017 USD 10,000.

v. 25th August 2017 USD 10,000.

2. USD account number 0180273781178 in the name of LIDI Estates Limited held at Equity Bank Limited Community Branch, Nairobi received suspicious cash deposits of USD 29,000 on diverse dates as follows:

i. 5th August 2017 USD 20,000;

ii. 29th August 2017 USD 9,000;

3. Kenya Shillings account number 0180273781104 in the name of LIDI Estates Limited held at Equity Bank Limited, Community Branch, Nairobi received suspicious cash deposits of Kshs 1,850,000/= on diverse dates as follows:

i. 25th August 2017 Kshs 900,000/=;

ii. 18th September 2017 Kshs 950,000/=.

4. Kenya Shillings account number 0180273780467 in the name of LIDI Holdings Limited held at Equity Bank Limited, Community Branch, Nairobi received suspicious cash deposits of Kshs 3,360,000/= on diverse dates as follows:

i. 25th August 2017 Kshs 900,000/=;

ii. 11th January 2018 Kshs 470,000/=;

iii. 8th May 2018 Kshs 1,094,500 deposits from LIDI Holdings;

iv. 15th May 2018 Kshs 895,500 deposits from LIDI Holdings.

5. USD account number 0180273780412 in the name of LIDI Holdings Limited held at Equity Bank Limited Community Branch, Nairobi received suspicious cash deposits of USD 29,000 on diverse dates as follows:

i. 5th August 2017 USD 20,000;

ii. 29th August 2017 USD 9,000.

6. Kenya Shillings account number 7825846007 in the name of Sheela Wangari Mbogo held at Diamond Trust Bank Limited Capital Centre, Branch Nairobi received suspicious cash deposits of Kshs 4,320,000/= on diverse dates as follows:

i. 15th April 2016 Kshs 100,000/=;

ii. 2nd July 2016 Kshs 200,000/=;

iii. 27th July 2016 Kshs 600,000/;

iv. 28th July 2016 Kshs 200,000/=;

v. 13th September 2016 Kshs 150,000/=;

vi. 23rd January 2017 Kshs 500,000/=;

vii. 21st March 2017 Kshs 500,000/=;

viii. 31st July 2017 Kshs 800,000/=;

ix. 24th August 2017 Kshs 900,000/=;

x. 22nd August 2018 Kshs 70,000/=;

xi. 2nd February 2018 Kshs 300,000/=.

7. Kenya Shillings account number 7041746001 in the name of Shalom Malaika Kamweti held at Diamond Trust Bank Limited, Village Market Branch, Nairobi received suspicious cash deposits of Kshs 4,120,000/= on diverse dates as follows:

i. 4th March 2016 Kshs 100,000/=;

ii. 27th July 2016 Kshs 600,000/=;

iii. 28th July 2016 Kshs 200,000/=;

iv. 13th September 2016 Kshs 150,000/=;

v. 23rd January 2017 Kshs 500,000/=;

vi. 21st March 2017 Kshs 500,000/=;

vii. 31st July 2017 Kshs 800,000/=;

viii. 24th July 2017 Kshs 900,000/=;

ix. 22nd January 2018 Kshs 70,000/=;

x. 2nd February 2018 Kshs 300,000/=.

8. Kenya Shillings account number 5225803001 in the name of Stephanie Marigu Mbogo held at Diamond Trust Bank Limited, Village Market Branch Nairobi received suspicious cash deposits of Kshs 6, 255,750/= on diverse dates as follows:

i. 14th April 2016 Kshs 100,000/=;

ii. 31st May 2016 Kshs 200,000/=;

iii. 2nd June 2016 Kshs 200,000/=;

iv. 7th June 2016 Kshs 300,000/=;

v. 27th July 2016 Kshs 800,000/=;

vi. 27th July 2016 Kshs 500,000/=;

vii. 13th September 2016 Kshs 400,000/=;

viii. 23rd January 2017 Kshs 500,000/=;

ix. 21st March 2017 Kshs 600,000/=;

x. 16th June 2017 Kshs 100,000/=;

xi. 31st July 2017 Kshs 800,000/=;

xii. 24th August 2017 Kshs 900,000/=;

xiii. 2nd January 2018 Kshs 150,750/=;

xiv. 22nd January 2018 Kshs 60,000/=;

xv. 2nd February 2018 Kshs 400,000/=;

xvi. 13th February 2018 Kshs 100,000/=;

xvii. 1st March 2018 Kshs 145,000/=.

9. Kenya Shillings account number 0806061000 in the name of Lilian Wanja Muthoni Mbogo T/A /Sahara Consultants held at Diamond Trust Bank Limited, Capital Centre Branch Nairobi received suspicious cash deposits of Kshs 7, 200,000/= on diverse dates as follows;

i. 4th March 2016 Kshs 200,000/=;

ii. 27th July 2016 Kshs 800,000/=;

iii. 28th July 2016 Kshs 1, 300,000/=;

iv. 23rd January 2017 Kshs 1,500,000/=;

v. 21st March 2017 Kshs 800,000/=;

vi. 31st July 2017 Kshs 800,000/=;

vii. 24th August 2017 Kshs 900,000/=;

viii. 24th August 2017 Kshs 900,000/=.

17. Musyoki deposes that his investigations established that the deposits were made in tranches below Kshs 1,000,000/= to evade the reporting threshold required by section 44 and the 4th Schedule of POCAMLA, regulation 34 of the POCAMLA Regulations of 2013 and the Central Bank of Kenya Prudential Guidelines For Account Holder to declare the source of the money.

18. The applicant had served all the respondents on 24th October 2018 with the Kenya Police requisition form P 52 (annexure 'FM 8') to appear before him on 25th October 2018 at 9.00 a.m. at DCI headquarters Mazingira House along Kiambu road for purposes of recording their statements in relation to the sources of the funds in issue. The 1st respondent, her husband and their Advocate had appeared on 25th October 2018 in compliance with the requisition.

19. In her statement (annexure 'FM 9'), the 1st respondent had stated that the cash in issue was given to her by her husband, Dick Achieng Oneko, who is a co-director in their companies. She had subsequently split the cash into tranches and had deposited the cash in the various accounts. The 1st respondent had also stated that she does farming with her husband in Siaya County where they grow agricultural crops and the source of the funds in the accounts at issue was this farm. She did not, however, produce any proof of the existence of the farm business such as trade permits, tax returns, tax compliance certificates, capital gains certificate, Electronic Tax Register (ETR) evidence, vendor/purchaser invoices or anything to support the existence of the said farming business. Musyoki noted that despite the farm produce being sold in Siaya, the 1st respondent only deposits the cash in Nairobi instead of the nearest banks.

20. In his statement (Annexure 'FM 10'), the 1st respondent's husband and co-director, Dick Achieng Oneko, stated that the source of the cash which he gave to the 1st respondent was his earnings from a company known as Nile International where he offered consultancy services in the Republic of South Sudan. Further, that he used to be paid in cash and was not signing anywhere to confirm receipt. He had allegedly brought the said cash into the country without declaring it at the point of entry into Kenya contrary to section 12 (1) and the 2nd Schedule of POCAMLA and regulation 8 of the POCAMLA Regulations, 2013. Musyoki avers that Dick Achieng Oneko did not produce any evidence to prove the existence of such consultancy services or who engaged him on the said consultancy. The respondents had thus not given a reasonable explanation for the funds or shown that there is a legitimate source of funds, and it was Musyoki's deposition that there is reasonable grounds to believe that the cash in issue is part of the funds stolen from the NYS.

21. It was further averred on behalf of the applicant that on 29th October 2018, it had obtained preservation orders (FM 11) in Miscellaneous Application No. 49 of 2018 of a total of USD 105,293.7 and Kshs 22, 445, 487.74 held in the bank accounts aforesaid. The orders were gazetted on 9th November 2018 vide Gazette Notice No. 11570 (annexure 'FM 12') pursuant to section 83 (1) of POCAMLA.

22. The applicant's summary of the position was that the cash deposited in the respondents' accounts was unlawfully acquired and was therefore proceeds of crime as defined in POCAMLA; there was no reasonable explanation from the respondents on why the children of the 1st respondent, some of them minors, have accounts in which large suspicious cash transactions are taking place; and there are reasonable grounds to believe that the children's accounts are used as conduits for money laundering contrary to sections 3, 4 and 7 as read together with section 16 of POCAMLA. The cash transactions were made between January 2016 and March 2018, the period the theft of fund from NYS occurred; they are proceeds of crime and are therefore liable to be forfeited to the State under POCAMLA.

The Response

23. The respondents oppose the application and rely on affidavits sworn by the 1st respondent, Lilian Wanja Muthoni Omolo, on 5th April 2019 and an affidavit sworn by Nam Oneko, her brother in law, on 1st July 2019.

24. In her affidavit, the 1st respondent confirms that she is a director of the 2nd and 3rd respondents. She is also the biological mother of the 4th, 5th and 6th respondents. She avers that the application for forfeiture is premature as no notice of its lodgment was given to the respondents as required under sections 83 (3) read with 90 (2) of POCAMLA. She accordingly asks the court to strike out the application on this basis.

25. It is also her averment that the application for forfeiture is misconceived as there is no evidence whatsoever to support the allegation that the subject bank accounts contain proceeds of crime. This is because she is able to show clear, cogent and irrefutable evidence of the legitimate and lawful source of all the funds held in the accounts. She asserts that in her statement to the applicant made on 19th November 2018, she had delivered to the applicant documents and evidence showing the legitimate sources of funds held in the subject bank accounts.

26. The 1st respondent denies that the funds in the accounts were proceeds of crime or that they were stolen from the NYS. Further, that there is no proof that funds were allocated to the NYS in order for such funds to be stolen, nor was there proof that a crime was committed at NYS in which public funds were stolen. It is also her averment that she has not been charged with stealing, nor have any of the respondents.

27. The 1st respondent further avers that there is no proof that she or any of the respondents received property or derived economic benefit from NYS property or that NYS funds were converted. It is her deposition that in the charge sheet annexed to the application for forfeiture, none of the respondents is charged with conversion, receiving or deriving economic benefit from NYS. In her view therefore, there can be no allegation of proceeds of crime to support the application for forfeiture. The 1st respondent avers that the applicant has not discharged the initial burden of proof to require the shifting of the evidentiary burden to the respondents.

28. The 1st respondent contends that an order of forfeiture may only issue once there has been a conviction following a full criminal trial. Since there has been no conviction, against any of the respondents, no orders of forfeiture can issue. Further, that no such orders can issue as against the 2nd, 3rd, 4th, 5th or 6th respondents as they have not been charged with any offence. The 1st respondent avers that the application, which purports to arbitrarily deprive the respondents of their lawful property and which limits their access to the funds in their bank accounts, amounts to a gross violation of their constitutional rights under Article 40 (2) of the Constitution.

29. With regard to her own position, the 1st respondent avers that she has not yet been convicted; that there are ten criminal cases pending in the Nairobi Chief Magistrate's Court Anti-Corruption Court which have not been concluded and are still at the hearing of the prosecution case with more than forty (40) witnesses lined up and yet to testify; and that she has a right to the presumption of innocence. It is therefore, in her view, wrong, incorrect, and a violation of her rights for the applicant to presume conviction.

30. The 1st respondent maintains that the sentence of forfeiture or confiscation may issue only where the proven crime is theft of public funds; that the tenor of POCAMLA requires cogent proof that it was the respondents and no-one else who received or derived a benefit from the lost public funds before an order of forfeiture can be made; and it would therefore be wrong and unjust to make an order of forfeiture in this case. She asserts that from the charge sheets, there is no allegation of theft of public funds against her or the other respondents; that the third parties who actually received payments from NYS are identified in the charge sheets and the exact payments specified; and there is therefore no nexus between the NYS payments and any of the respondents to support the application for forfeiture.

31. The 1st respondent avers that under section 92 (1) of POCAMLA, the burden of proof in an application for civil forfeiture is on a balance of probabilities. The applicant is therefore required to first discharge the initial burden by proving its allegations by evidence before the burden shifts to the respondents. She contends that the applicant has failed to prove actual loss of public funds in the Ministry of Youth and Gender Affairs in which she served as the Principal Secretary which is a national government entity whose financial management systems are governed by the provisions of the Public Finance Management Act (PFMA).

32. The 1st respondent makes various detailed averments with respect to the provisions of the PFMA to conclude that nothing in the application alleges or proves any crime or supports the allegation that she received or derived any benefit from public funds in the manner that she discharged the functions of her office to warrant the application for forfeiture. It is also her averment that the applicant does not allege that the other respondents received or derived benefit from public funds.

33. The 1st respondent contends that in accordance with section 206 of the PFMA, she is not liable in these proceedings as she discharged the powers and functions properly vested in her office in good faith and not for personal gain in any manner whatsoever. She asserts that as the Principal Secretary and accounting officer to the State Department for Public Service and Youth within the Ministry of Youth and Gender Affairs, she dutifully and meticulously discharged her responsibilities in good faith in line with the PFMA and regulations published thereunder for the sole purpose of executing the powers, functions and duties of her office. Her responsibilities included ensuring resources are used in a way that is lawful and authorized, efficient, effective, economical and transparent; that she was required to ensure that compliant financial and accounting records are kept, adequately protected and backed up; and that all contracts entered into are lawful and complied with.

34. It was also her averment that all contracts and records of all procurement process were duly kept and maintained; and that all accounting and financial records were also properly maintained and reports furnished as prescribed. Her deposition was that the State Department is fully IFMIS compliant and all procurement and payments follow the e-procurement process and e-accounting process for payments. She contends that she ensured that the applicable accounting and financial controls, systems, standards, laws and procedures obtaining under the PFMA and regulations were duly complied with in procuring goods and services, and she implemented applicable accounting and reporting standards, with proper books of accounts kept and maintained in respect of all contracts, projects and donations.

35. According to the 1st respondent, all resources, whether cash, donation, grants or other public funds were duly accounted for and records thereof maintained in full compliance with regulatory standards defined in the Public Finance Management (National Government) Regulations, 2015. She therefore asserts that there was no expenditure not budgeted for or authorized, and neither was there any project not planned for capable of constituting a crime involving public funds or from which she derived or received a benefit as alleged by the applicant. The 1st respondent maintains that at no time was she involved in any unauthorized spending within the Ministry. All expenditure incurred was for a marked purpose and funds spent therefor were in respect of goods and services properly procured, budgeted for and properly approved.

36. The 1st respondent asserts that she implemented and oversaw proper expenditure management and control systems and proper asset management systems as required by regulations during her term. It was her deposition that the applicant has not identified any single lapse, failure or impropriety that informs its allegation that a crime was committed resulting in loss of public funds at NYS. She relies on a statement (LMO-1(a)) that she recorded on 2nd May 2018 at Harambee House showing the accountability systems that she had implemented. It is her case that the office of the Auditor General in its report dated 24th April 2018 (LMO-1(b)) had confirmed that there were no unresolved audit matters or pending audit queries within the State Department of Public Service and Youth for the Year ended 30th June 2017. She averred that in effect, the Auditor General had confirmed that the audit disclosed no unlawful or ineffective application or expenditure of public funds.

37. According to the 1st respondent, the Ministry or the NYS records numerous transactions every day of varied types involving many

suppliers. While the applicant had unfettered access to these records, it had shown bad faith and mischief by conveniently concealing details out of the numerous records and not making reference to any of the projects in its application. It had also not provided any proof showing that funds allegedly lost were re-channeled to the respondents. It is also her contention that no audit report either by the internal audit committee or independent external auditors has been tendered to support the allegation of loss of public funds at NYS.

38. The 1st respondent avers that the forfeiture application lacks precision and is devoid of sufficient particularity to back its allegations that a crime was committed. She alleges violation of her constitutional right under Article 50 (2)(b) to be informed of the alleged crime from which she derived economic benefit with sufficient details to prepare a defence thereto. It is her contention that the Director of Public Prosecution, as the charge sheet demonstrates, has charged the suppliers who are the true beneficiaries of the NYS payments; that the question surrounding any legality or propriety of payments made to the suppliers by NYS is pending for judicial determination in the Chief Magistrate Anti-Corruption Court; and if there was any suspected illegality, forfeiture proceedings should properly have been commenced against those suppliers as beneficiaries of the payments and not the respondents.

39. It is also the 1st respondent's deposition that contrary to the averments by the applicant, not all the respondents were served, the notices, all dated 24th October 2018, having been served on the 1st respondent though addressed to the other respondents. No prior notice was given of the particulars or scope of investigations or of the allegations against them. The respondents were not given adequate opportunity to prepare their defences or responses to specified allegations to be tabled against them; no prior notice of the documents which would be needed for purposes of refreshing their memory while recording statements in their defence was given, nor were they given an indication that documents would be required during the investigations. They were also not given an opportunity to produce relevant documents and evidence in support of their defence showing their sources of income to exonerate themselves, despite requests to do so.

40. In explaining the sources of the funds the subject of this matter, the 1st respondent states that she has a farm in Siaya which purchases and resells fruits and other products for profit. It is her averment that the farm is a legitimate source of income whose produce is resold and moneys paid into, among others, the subject bank accounts. She annexes in support what she refers to as the Siaya Farm report and payment receipts (LMO-2).

41. The 1st respondent further avers that her husband, Dick Achieng Oneko, also engages in international consultancy in the energy and natural resources sector where he earns considerable income through commissions. Part of this income is channeled into the subject bank accounts, and she annexes as proof of her husband's international consultancy contract an affidavit sworn by one Micah Kigen (LMO-3). Her averment is that these documents show that the subject bank accounts have legitimate sources of funds.

42. The 1st respondent further avers that she derived a salary from her employment as a public servant, portions of which she applied as savings and were also invested into various income-generating ventures as well as into the real estate, landholding and construction ventures. That she also took out mortgages and loans for investment in profit making ventures, and it is part of the legitimate proceeds from these ventures that were directed into the subject bank accounts. In support of this averment, she annexes a handwritten statement which she states shows her earnings through Sahara Consultants and other sources of income, as well as a statement (LMO4) explaining the origin of funds and cash flow in the said bank accounts.

43. The 1st respondent maintains that the transactions in the specified bank accounts were effected in the ordinary course of business, they all involved legitimate sources, and they were from private funds from her businesses and not from crime involving NYS. It is her averment therefore that an order for forfeiture as prayed for in this application would unlawfully divest her of her personal funds raised from legitimate sources, thus perpetrating an injustice against her and her family.

44. The 1st respondent asserts that the mere existence of a criminal case against her, which does not extend to the other respondents, does not in law amount to a conviction nor can it be a basis for issuance of forfeiture orders without proof of actual commission of a crime and proof of unlawful receipt of public funds from the said crime. She contends that mere holding of multiple bank accounts by a public officer in the names of business entities, companies or minors and the mere operation of such bank accounts through deposits and withdrawals does not in law constitute money laundering nor can it be taken as proof of theft. It is also her assertion that it is not a crime under any law in Kenya to transact funds below Kshs 1,000,000/- . She urges the court to dismiss the application for forfeiture unconditionally, lift the preservation orders and restore to the respondents unfettered access to the subject bank accounts.

45. The respondents also relied on an affidavit sworn by Nam Oneko, a resident of Uyoma in Siaya County and a brother in law of the 1st respondent. Nam Oneko states that he is the farm manager of the family agribusiness in Uyoma which is principally financed by his brother, Dick Oneko, the 1st respondent's husband. Nam Oneko swore his affidavit in support of an application by the respondents for the court to make a site visit to the farm at Siaya to see that the respondents have a farm from which they source the funds in the bank accounts at issue. This application was dismissed by the ruling of this court dated 7th October 2019.

46. According to Nam Oneko, Dick Oneko has been providing the capital input, infrastructure development and other financial support required for the smooth operations of the agribusiness which they have been engaged in for over ten years. He avers that as farm manager, his responsibilities include preparing the working schedule for the season, and he is also in charge of managing allocation of resources in order to implement the season cycle farming plan. He was also involved in the commercial sales and marketing of the farm's premium horticultural products.

47. Nam Oneko avers that their greenhouses utilize a high tech, modern, intensive hydroponic farm system whose crop yield per metre square is on average 10 times the quantity of the traditional greenhouse technology; that the unique feature of the technology is an automated smart valve that allows the plants to feed themselves on demand; that they cultivate, raise and sell horticultural crops ranging from tomatoes, sweet melons, sweet peppers - capsicum, cucumbers and cherry tomatoes; that their produce is purchased by middlemen and ordinary vegetable sellers through informal arrangements premised on a demand-and-supply basis as well as in open air markets within Nyanza region.

The Applicant's Affidavits in Response

48. In his affidavit in reply to the 1st respondent's affidavit sworn on 5th April 2019, No. 62652 Cpl. Isaac Nakitare, a Police Officer who is part of a team of police investigators undertaking investigations into this matter and attached to the applicant avers that the regimes of civil forfeiture and criminal forfeiture are distinct from each other and are pursued in separate proceedings. It is his case that they served the 1st respondent with all the pleadings and summons on behalf of the rest of the respondents since she is a Director of the 1st to 3rd respondents and the mother of the 4th to the 6th respondents.

49. Nakitare further avers that he and Musyoki had travelled to Uyoma in Rarieda District to the home of the late Achieng Oneko, the father in law of the 1st respondent. They had found that there is no farm in existence as alleged by the 1st respondent, but that there was a piece of land with shrubs. The piece of land, according to Naitare, belongs to the family of the late Achieng Oneko. They had met one Nam Oneko, the 1st respondent's brother in law, on the land, and he had informed them that the land belonged to the family of the late Achieng Oneko and is not yet sub-divided among the family members. Nakitare averred that they had established that there were no farming activities on the land as alleged by the 1st respondent. They had noted that there is one small sized greenhouse located on a small portion of the land which Nam Oneko informed them belonged to him. They had also established that there were some small tomatoes which were yet to mature planted inside the greenhouse but not at commercial scale level. Nam Oneko had told them that he uses the greenhouse for subsistence farming.

50. Nakitare notes that most of the receipts produced by the 1st respondent (annexure LMO-2) fall outside the years 2016, 2017 and 2018, the period when the funds in issue were stolen from the coffers of the NYS. He further notes that although the authenticity of the receipts produced cannot be ascertained, the total amounts in the receipts which fall within the period when the suspicious deposits were made amount to approximately Kshs 390,000/=, which is far below the funds in issue. It was his averment that there was no evidence to show linkages between the funds in issue and the alleged farm.

51. With respect to the international consultancy ran by the 1st respondent's husband, Nakitare averred that the applicant had, on 24th April 2019, obtained orders in Misc Criminal Application No. 1748/2019 to search, inspect, seize and obtain accounts opening documents and statements of accounts since inception to date, as well as cheque and cash deposit slips, withdrawals slips and RTGS transfers covering the same period and any other relevant documents for account NO.0100001992788 held in the name of Nile International Limited at CFC Stanbic Bank, Westgate Branch. Branch (annexure I N 1). From their analysis of the account opening documents and statements ('IN 2'), they had established that from 9th August 2011 to 19th April 2019, a total of 9 credits or deposits of USD 225,005.67 were made in the said account which is equivalent to approximately Kshs. 22, 725,572.67/=. This was contrary to the assertion by the 1st respondent that her husband received Kshs.40, 000,000 from the said account as a result of consultancy works.

52. In the same period, from 9th August 2011 to 19th April 2019, a total of 282 debits or withdrawals of USD 224,718.90 which is equivalent to approximately Kshs 22, 696,608.9 were made in the said account. This, according to Nakitare, was far below the Kshs 40,000,000 allegedly paid to the 1st respondent's husband. It was also his averment that his analysis of the said account established that there was no single deposit for the period 2016, 2017 and 2018 which is the period under investigations. Nakitare averred therefore that the assertion that the funds in issue are partly from payment of consultancy fees through the said account is not true.

53. Nakitare deposed further that contrary to the averments of the 1st respondent, his analysis of the account statements had revealed no evidence of payments or transactions in accordance with the purported consultancy service fee sharing agreement indicating any payment to the said firm or to the 1st respondent's husband, or any subsequent payment to the 1st respondent from the account as she alleged. Since the 1st respondent had not shown a legitimate source of the funds in the accounts the subject of this applicaton, they were proceeds of crime and liable to forfeiture to the State.

54. The applicant also filed a further supplementary affidavit sworn by Cpl. Nakitare. Nakitare avers that as an investigator with the applicant, he is required to share and receive information with and from other law enforcement agencies including the Kenya Revenue Authority on suspects' tax affairs. In this regard, he had, on 28th May 2019, eceived, the 1st respondent's income tax returns statements for the years 2015, 2016, 2017 and 2018 (annexures 'IN 2(a) (b) (c) & (d)). He had noted that these statements do not disclose any income from the farming business, the only income disclosed by the 1st respondent for the years 2015, 2016, 2017 and 2018 being her salary returns from NEPAD Kenya Secretariat and the State Department for Public Service which were her previous employers. It was his averment therefore that the 1st respondent has not discharged the burden of proving the legitimate source of the funds in issue. His deposition was that from the tax returns, it is clear that the 1st respondent does not have any farming business which generates such income as can be the source of the funds in the specified accounts.

The Submissions

55. The parties hereto filed written submissions and authorities in support of their respective cases which were highlighted by their Counsel on record, Mr. Adow for the applicant and Mr. Ligunya for the respondents.

56. In its submissions dated 29th May 2019, the applicant reiterates its prayer for forfeiture to the government of the funds in the respondents' accounts which it asserts are proceeds of crime. It contends that it has given a chance to the respondents, particularly the 1st respondent who is the alleged owner of the funds, to explain the source of the funds but she has not done so. Her contention in her statement to the applicant and in her replying affidavit is that the funds in issue are partly from her farm in Uyoma in Siaya and partly from her husband who does consultancy business in South Sudan. It is its case that the respondents have not produced any evidence to support these contentions, nor have they produced any documents of ownership of the said farm by the 1st respondent or any documents showing that she is a farmer such as a business permit or Electronic Tax Register (ETR) receipts to show that she carries on business in Siaya.

57. The applicant further submits that while the respondents allege that they carry on business in Siaya and the farm produce from the farm is

allegedly sold in Siaya, the funds in issue are deposited in cash in Nairobi. In the applicant's view, it is illogical for one to do business in Siaya and the payments for the said produce is then carried miles away and deposited in banks in Nairobi. In its view, there is no linkage between the alleged farm and the funds deposited in Nairobi and in any event, it had carried out investigations and established that the alleged farm does not exist.

58. The applicant further submits that there are certain conditions that one must meet, such as payment of income tax, in order to show a legitimate source of funds. It had found that the respondents have not done any income tax returns, either from the 1st respondent's salary as a Principal Secretary in the Ministry of Public Service and Youth, or her previous employer, NEPAD Kenya Secretariat for the period under investigation. Its submission is that this leads to the irrebutable presumptions that the averment that the 1st respondent does farming and the funds in issue are from farming does not hold water.

59. The applicant also disputes the contention that the 1st respondent was given the funds in issue by her husband from his consultancy business, Nile International Consultancy Services, there being no evidence to show that the 1st respondent received any funds from her husband. It reiterates its averment that its investigations of the Nile International Consultancy Limited account in CFC Stanbic Bank, Westgate Branch had established that there was no single deposit into that account in the period under investigation. Further, that contrary to the agreement relied on by the 1st respondent which indicated that the account was supposed to receive Kshs 40 million from the said consultancy, it had never received such an amount in the period it was operational. There was also no single deposit in the said account in the years 2015, 2016 2017 and 2018. The applicant's conclusion was therefore that the two alleged sources of funds are not true, and the funds in issue are proceeds of crime. In its view, the facts and evidence that it had presented to the court had not been rebutted by the respondents, and it urged the court to grant the orders sought in the application. The applicant relies in support of its submissions on several decisions which I shall consider later in this judgment.

The Respondents' Submissions

60. The respondents filed submissions dated 27th November 2019 which were highlighted by Mr. Ligunya. According to the respondents, the applicant has made a very specific allegations directed at the 1st respondent. This is that the application is informed by investigations by the DCI into theft and fraud of public funds amounting to Kshs. 467,896,993 from the NYS. They further observe that the applicant states that financial investigations by the DCI had revealed massive schemes of embezzlement of public funds, fraud and money laundering, which rendered the funds in the respondents' accounts proceeds of crime and liable to forfeiture under POCAMLA.

61. The respondents further note that the applicant has stated that investigations further established that the funds were stolen and/or fraudulently transferred from the NYS to various suppliers' bank accounts, the suppliers having fictitiously supplied goods and services that were not rendered to NYS. The applicant had stated that further investigations had established that there are reasonable grounds to believe that the funds in the respondents' accounts are part of the funds stolen from the NYS.

62. It is the respondents' submission, arising from the foregoing, that the applicant had failed to discharge the legal and evidential burden on a balance of probabilities as required by section 92 (1) of POCAMLA. Their submission is that the court must call for proof that money existed at NYS, and that it was lost, before the respondents are called upon to answer. They assert that the applicant must show a budgetary allocation from the exchequer to the NYS for the years in question and the designated usage for the funds. It must also show proof of the diversion of money under the 1st respondent's watch and for her benefit. The respondents argue that the application is based on the false presumption that it is an established fact that an offence was committed, but the applicant had failed to show that NYS had public monies, and that such monies were lost.

63. The respondents argue, further, that the applicant has not shown the role that the 1st respondent played or failed to play that would form a basis for probing her bank accounts. It had not shown which contractor deposited money in the respondents' accounts, nor has it shown a causal link between the money in the accounts and NYS. The respondents contend that there are ongoing cases in subordinate courts against the suppliers charged with having gained benefits from NYS, and the 1st respondent has not been charged with receiving any benefit or having facilitated such benefit.

64. It is the respondents' contention further that there is no document that shows the 1st respondent's connection to monies allegedly paid to any of the contractors. They submit that the single allegation against the 1st respondent is that she was the sitting Principal Secretary (PS), and they contend that it is not an offence to serve as the PS, their assertion being that more evidence is required in a matter such as this beyond the fact of holding office. The respondents further contend that while the entire charge alleged against the 1st respondent is that monies were lost at NYS under her watch, no money was lost, the applicant having not provided the evidence. In their view, this is the question that is to be determined by the trial court in the criminal charges related to the NYS.

65. The respondents assert that no proof or chronological link has been drawn between monies leaving NYS and any of the deposits in the subject accounts, their submission being that suspicion alone is not evidence upon which the court can make any findings. They submit therefore that the applicant must show beyond a doubt that NYS received a particular allocation in a particular year, and that it lost money, with a specific amount being shown to have been stolen, before the court can start an inquiry into who took such money. While conceding that forfeiture proceedings can be lodged without a criminal conviction, the respondents submit that this does not take away the basic legal obligation on the applicant to establish the foundational elements of a crime by way of evidence.

66. The respondents further make several specific arguments against the application. They argue, first, that the applicant failed to discharge the initial burden of proving that the funds are proceeds of crime as required by section 92 (1) of POCAMLA. They submit that under section 92 (1), POCAMLA requires proof on a balance of probabilities before forfeiture is ordered. Their contention is that the applicant has not discharged the initial burden of proof of showing a *prima facie* commission of an offence that logically ties itself to the bank accounts the subject of the application. They reiterate that while the applicant alleged that NYS lost money, it had not specifically proved actual loss of public funds, nor has it directly linked the loss to the 1st respondent.

67. The respondents cite the definition of forfeiture in Black's Law Dictionary 9th edition at pg. 722 as ***"the loss of a right, privilege or property because of a crime, breach of obligation or neglect of duty"*** to submit that the applicant is under a duty to bring proof of the foundational elements of a crime. The respondents further cite the definition of ***'proceeds of crime'*** in section 2 of POCAMLA to argue that for one to allege that property constitutes proceeds of crime, they must prove an offence, realisation of a property as a result of the offence, and that one has derived or realised income, capital or other economic gains or benefits from the offence.

70. The respondents place reliance on section 107 of the Evidence Act to submit that the applicant has an obligation to prove, by evidence, that public funds totaling to Kshs 467,896,993/- was in fact disbursed by the Treasury and received at NYS for a specific purpose. They further assert that the applicant must prove that the Kshs 467,896,993/- was in fact stolen and or transferred from NYS to various suppliers' bank accounts, with the transfer transactions backed by financial records. They assert, thirdly, that the cash in the respondents' bank accounts must be proved to have been part of the funds stolen from NYS, their assertion being that the applicant must specifically prove the direct link between the transfers from NYS and cash deposited in the accounts at issue.

69. According to the respondents, the allegations against the 1st respondent specifically allege that NYS lost the specific sum of Kshs 467,896,993/- which was allegedly transferred or stolen by suppliers. They contend that this allegation is uniquely within the special knowledge of the applicant. They therefore cite section 112 of the Evidence Act to submit that once they deny any theft of public funds, the applicant is under an obligation to call evidence showing theft or transfer of public funds from NYS accounts, and that it must do so by producing financial and banking records. The respondents submit that without specific proof of the alleged theft of Kshs 467,896,993/- from NYS, the allegations of theft of such funds are not proved and there is no proof of tracing of funds to the respondents' bank accounts.

70. While contending that the NYS financial statements are in the applicant's custody or control or could have been obtained by the exercise of due diligence, the respondents argue that the applicant's failure to produce them is highly suspect, and the court should draw an adverse inference against the applicant that the concealment or non-disclosure was done with questionable motives with intent to suppress evidence. They cite in support of this submission **Woodroffe's Law of Evidence, 9th edition at pg. 811-816** cited by the Court of Appeal in **Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited [2019] eKLR**; **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR** and **Bukenya & others v Uganda [1972] 1 EA 549**.

71. The respondents contend that the applicant having failed to discharge the onus of proving loss of public funds from NYS or that the funds were traced to the respondents' accounts as a precondition to seeking forfeiture, the evidentiary burden of proof does not shift to them. Reliance is placed for this submission on **Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR**, in which the court held that:

> **"The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of the evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence."**

72. The respondents further cite the decision of the Court of Appeal in **PON v Republic [2019] eKLR, Crim App. No. NAI 16 of 2017** to submit that mere suspicion is not sufficient for a criminal conviction, and that it is not enough to plead mere suspicion that funds were lost as justification for claiming forfeiture.

73. The second limb of the respondents' opposition to the application is that the funds in their accounts have legitimate sources. They submit that they have furnished evidence on a balance of probabilities as required by section 92 (1) of POCAMLA to explain the legitimate sources of the funds Such evidence relates to the existence of the Uyoma farm, the extensive activities on the farm, and the receipts showing earnings derived from sale of produce from the farm. It is their submission that they have proved by evidence that the farm is a viable commercial venture and a viable source of the funds deposited into the subject accounts.

74. While urging the court to consider their arguments with respect to the existence of the farm despite its ruling rejecting an invitation to conduct a site visit to the farm, they contend that it is curious that the applicant did not furnish the court with photographic evidence to prove its allegation that the farm was desolate. They further argue that the applicant should have brought evidence of the 1st respondent's tax records showing that the farming income was not declared. It is also their case that the 1st respondent has furnished evidence in the form of a handwritten statement explaining the origin of funds and her cash flow from various sources, including savings from her employment salary and allowances, and that part of such funds were deposited into the accounts.

75. It is their argument further that the 1st respondent had detailed in the statement her diverse activities in real estate, landholding and construction ventures; that she had taken out mortgages and loans for investment in profit making ventures, and it is the legitimate proceeds from these ventures that were directed into the subject bank accounts. The respondents argue that the applicant has failed to rebut their evidence on the 1st respondent's other varied income sources, and her evidence is accordingly unchallenged and it qualifies as credible proof of legitimate sources of her income on a balance of probabilities.

76. It is also the respondents' submission that they have proved their income by adducing evidence of the international consultancy contract backed by an affidavit confirming payments to the 1st respondent's husband from his international consultancy in the energy and natural resources sector where he earns considerable income through commissions. They maintain that part of this income is also channeled into the respondents' bank accounts.

77. The respondents submit that there is no illegality demonstrated in the manner in which the deposits in the subject accounts were made; that there is no illegality in transacting in foreign currency, in holding foreign currency accounts, nor in holding accounts in the names of minors. It is their submission further that in any event, all the subject accounts were opened before the 1st respondent entered public office as PS and in their view, this dispelled the notion that the accounts were opened purposely for siphoning public funds through fraud or

embezzlement.

78. The respondents submit further that in any event, fraud must be specifically pleaded and particulars thereof given, and must be proved beyond a mere balance of probabilities, which has not been done in this case. Reliance is placed for this submission on the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others** in which the case of **R. G. Patel v Lalji Makanji [1957] EA 314** at 317 which emphasised that allegations of fraud must be strictly proved, the standard of proof in respect of which is not so heavy as to require proof beyond reasonable doubt, but in which something more than a mere balance of probabilities is required.

79. The respondents contend that at no point did the respective banks flag any of the subject accounts for suspicious activity as required under the Prudential Guidelines issued by Central Bank of Kenya through circulars as required under the Banking Act and POCAMLA. They submit that the banks are reporting institutions under POCAMLA but they did not raise any flags on the respondents' banking behaviour. In their view, there was no illegality shown to the court, reliance being placed on the case of **Otieno Omuga & Ouma Advocates v CFC Stanbic Bank Limited [2015] eKLR** with respect to the reporting obligations of banks under POCAMLA.

80. The respondents submit that the applicant has failed to lay any legal or evidentiary basis for alleging that the respondents are involved in money laundering as an offence, provided for under section 3 of POCAMLA. They assert that mere suspicion is not enough, relying in support on **Republic v Director of Public Prosecutions & another ex parte Patrick Ogola Onyango & 8 others [2016] eKLR** where it was held that the prosecution had a duty to prove the *actus reus* and *mens rea* of the offence of money laundering.

81. The respondents submit, thirdly, that there was no loss of public funds at the NYS. They argue in this regard that the report of the Office of the Auditor General had shown that there were no unresolved audit matters or pending audit queries within the State Department of Public Service and Youth for the year ended 30 June 2017. In their view, the Auditor General had confirmed that the audit disclosed no unlawful or ineffective application or expenditure of public funds. The respondents assert that the report of the Auditor General confirmed that there were no financial or accounting irregularities at NYS.

82. The respondents submit at length on the functions and duties of the 1st respondent as the PS. They assert that she implemented and oversaw proper expenditure management and control systems, among others, and that there were no particulars of any offences of omission or commission during her tenure at NYS that caused theft or unlawful transfer of public funds. They further make detailed submissions with respect to the use of public finance as provided under the Public Finance Management Act and submit that under section 206 of the Act, the 1st respondent is entitled to immunity in these proceedings as she had discharged the powers and functions properly vested in her office in good faith and not for personal gain.

83. The respondents' fourth argument against the forfeiture application is that it is brought against the wrong parties. It is their submission that the proceedings should have been brought against parties who can be shown to have received or benefited from NYS payments. In their view, going by the charge sheets annexed to the application, the third parties who actually received payments from NYS are identified and the exact payments specified. They submit further that the charge sheets also confirm that the DPP duly charged the suppliers who are the true beneficiaries of the NYS payments.

84. The respondents submit that no nexus has been shown between the NYS payments and any of the respondents. Their submission is that if the applicant suspects that the payments constituted an offence, it ought to have commenced forfeiture proceedings against the suppliers and not against the respondents. In their view, any questions regarding the legality or propriety of payments made to the suppliers by NYS is pending for judicial determination in the Chief Magistrate Anti-Corruption Court against the suppliers and not against the 1st respondent or any of the respondents.

85. The respondents submit in their final ground that the application is speculative and does not have any proof of any offence known to any law. They reiterate that mere allegation does not dispense with the legal burden on the applicant to prove its allegations; that the mere issuance, existence or gazettement of a preservation order does not constitute proof of proceeds of crime; and that apprehension or general and empty allegations do not amount to sufficient evidence that funds are proceeds of crime. It is also their submission that the mere existence of a criminal case against the 1st respondent, which does not extend to the other respondents, does not in law amount to a conviction and neither can it be a basis for issuance of forfeiture orders without proof of actual commission of a crime and proof of unlawful receipt of public funds from the said crime.

86. They further reiterate that the mere holding of multiple bank accounts, whether or not by a public officer, in the names of business entities, companies and minors and the mere operation of the said bank accounts through deposits and withdrawals does not in law constitute money laundering, and neither can it be taken as proof of theft. It is also their case that it is not a crime to transact funds in tranches of below Kshs 1,000,000/- under any law in Kenya.

87. Finally, the respondents submit that the provisions of POCAMLA on forfeiture without conviction should not be used as a weapon to defeat the respondents' property rights protected under Article 40(1) and (2) of the Constitution. They contend that the legislative intent behind forfeiture provisions in POCAMLA is to secure restitution of public funds irregularly acquired or which expressly constitute proceeds of crime back to the State. This means, in their view, that the intent behind forfeiture is for the State to confiscate property comprising proceeds of crime or property used in connection with a crime.

88. The respondents further submit that the applicant is required to provide proof of the alleged illegality in an open and public hearing by a court of competent jurisdiction as required by Article 25 (c), 40 (6), 48, 50 (1) and 258 (1) of the Constitution. Their submission is that since no crime of receiving property or deriving economic benefit is alleged or demonstrated by evidence, no punishment can issue for an offence for which the respondents are not charged. They urge the court to exclude the interests of the respondents pursuant to section 94 of POCAMLA by dismissing the forfeiture application and lifting the preservation orders.

89. In responding to the applicant's submissions, the respondents argue that the authorities relied on do not apply to the present

circumstances. They submit that the decision in **Assets Recovery Agency v Pamela Aboo, ACEC 58 of 2017** does not apply in this case as the facts are different in that the respondent in that case was not doing any withdrawals from her account despite substantial deposits, hence the suspicion that the funds are proceeds of crime. In this case, their accounts were active throughout and were opened even before the 1st respondent's tenure as the PS.

90. The respondents ask the court to distinguish the decisions in **Asset Recovery Agency v Rohan Anthony Fisher & others** and **NDPP v Rebuzzi quoted in Schabir Shaik & others v State** which they submit have statutory frameworks that have irreconcilable differences with the statutory regime in Kenya.

91. The respondents conceded through Mr. Ligunya's oral submissions that the country is struggling with corruption and there is a need to stamp it out. However, their submission was that the country is also governed by the rule of law, and everyone deserves benefit of the law. In their view, unlike natural resources, money does not, by default, vest in the State, and it could not properly be said that money that cannot be accounted for belongs to the State. It was also their submission that the applicant had asked the court to forfeit all the funds in the 1st respondent's accounts without taking into account her salary at NEPAD in 2015 prior to joining the government. The respondents urged the court to uphold the law, dismiss the application with costs and allow for proper evidence to be brought even if this would be done before the criminal court.

The Applicant's Submissions in Reply

92. In countering the respondents' submissions, Mr. Adow argued, first, that the present application had been lodged under the provisions of POCAMLA and the provisions of the Anti-corruption and Economic Crimes Act (ACECA) did not apply. He submitted further that there was no breach of the law with respect to the respondents, noting that they had been given time and opportunity to explain the sources of the funds in issue, but their explanation did not satisfy the applicant nor did it explain the source of funds.

93. The applicant reiterated that it did not have the mandate to prosecute the respondents, its mandate being to recover proceeds of crime in a civil case. Mr. Adow submitted, however, that the 1st respondent and others are facing criminal charges in other courts, the charges being that she and others embezzled funds belonging to the NYS. The applicant was investigating what had been stolen from NYS by the 1st responded and others, and its contention was that the funds in issue are suspected to have been stolen from NYS. Counsel cited the decision in **Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (2018)eKLR** in which the court held that where one is unable to explain a source of funds, the court will take it that the funds were not lawfully acquired, and in its view, this case falls squarely within that holding.

94. The applicant further dismissed the respondents' allegation that no money was stolen from the NYS, noting that it was not within their ambit to make such a claim. As for the Auditor-General's Report, the appellant submitted that the Auditor-General was not before the court. In any event, that report could not be used as evidence to rebut the evidence presented by the applicant.

95. With regard to the affidavit of Micah Kigen relied on by the respondents, the applicant noted that it has not been filed in court and was just an annexure to an affidavit. Further, the said Micah Kigen was not before the court to verify the affidavit, and an affidavit cannot be an annexure to another substantive affidavit as was held in the case of **R v Ministry of Health and 2 others JR No 2 of 2018**. In any event, according to the applicant, even had it been properly filed, it was of no assistance to the respondents as the amount referred to in the document was supposed to go to a certain account yet there was no single deposit in the account during the period in question.

96. To the contention that the applicant did not consider the 1st respondent's salary from NEPAD, the response from the applicant was that the 1st respondent did not present anything that showed that the amount in question was from her salary from NEPAD or the government, and the argument relating to her salary from NEPAD had only been raised in submissions from the bar.

Analysis and Determination

97. I have considered the pleadings and submissions of the parties, as well as the authorities relied on by the parties in support of their respective cases. From the pleadings and submissions, I believe that the following are the issues that arise for determination:

> **i. Whether the funds held in the respondents' bank accounts are proceeds of crime and therefore liable to forfeiture to the state;**
>
> **ii. Whether the application for civil forfeiture is in violation of the respondents' rights to property and the right to a fair hearing guaranteed under Articles 40 and 50 of the Constitution respectively;**
>
> **iii. Whether a criminal conviction is a precondition for civil proceedings under Part VIII of POCAMLA.**

Whether the funds held in the respondents' bank accounts are proceeds of crime and therefore liable to forfeiture to the State

98. The first issue to consider is whether the funds held in the respondents' accounts are proceeds of crime as defined in POCAMLA. Should the court find that the applicant has established that they are indeed proceeds of crime, the next question is whether they should be forfeited to the state as prayed by the applicant.

99. I begin ny analysis by considering the legislative framework under which the application is made. The application is brought under the provisions of POCAMLA. This Act of Parliament, as its long title indicates, is intended to ***'…provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes.'*** At section 2, the Act defines *'proceeds of crime'* as follows:

"proceeds of crime" means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed;" (Emphasis added)

100. Under Part VIII, the Act sets out the procedure to be used in cases of civil forfeiture. Section 82 empowers the applicant in this case, the Asset Recovery Agency, to apply for preservation orders in situations where there are reasonable grounds to believe that the property concerned has been used or is intended to be used for commission of an offence, or that it is proceeds of crime. Section 90 contains provisions with respect to forfeiture of property preserved under orders issued pursuant to section 82 of POCAMLA. The section, which is titled *'Forfeiture of Property'*, provides as follows:

90. Application for forfeiture order

(1) If a preservation order is in force, the Agency Director may apply to the High Court for an order forfeiting to the Government all or any of the property that is subject to the preservation order.

101. Under section 92 titled *'Making of forfeiture order'*, POCAMLA provides that:

***(*1) The High Court shall, subject to section 94, make an order applied for under section 90(1) if it finds on a balance of probabilities that the property concerned—**

(a) has been used or is intended for use in the commission of an offence; or

(b) is proceeds of crime.

(2) The Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the Government of property forfeited to it under such an order.

(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated. …

(Emphasis added)

102. In the present case, the 1st respondent has been charged with others in ACC 8, 10, 12, 13, 16 and 17 of 2018. The charges arise in relation to theft of funds from the NYS, which fell under the Ministry of Public Service, Youth and Gender in which the 1st respondent was the Principal Secretary. In the period 2016-2018, a total of US$ 105,293.7 and Kshs KSHS 22, 445, 487.74 was deposited in the accounts the subject of the application. The accounts are in the name of either the 1st respondent, her business, companies in which she and her husband are directors, and accounts held in the names of her three children, two of whom are minors.

103. The deposits in these accounts, as set out above from the averments of Senior Sergeant Musyoki, were made on or about the same dates, 27th July 2016 in 4 accounts in tranches of Kshs 500,000, 600,000, and 800,000; on 5th August 2017, deposits of US$ 20,000 were made in two accounts held in the name of Lidi Estates Limited; and on 25th August 2017, deposits of US$ 10,000 in an account in the name of the 1st respondent and Kshs 900,000 in each of two accounts held in the name of Lidi Estates Limited. An analysis of the statements of account shows that the funds were deposited in the said accounts in tranches of Kshs 500,000-950,000, sometimes in different accounts on the same date; but mostly within the same time period, 2016-2018. The applicant says that these funds are proceeds of crime. It states that it asked the respondents to explain the source of the funds, but the respondents could not explain the legitimate sources of the funds.

104. In their submissions, the respondents make three main arguments against the forfeiture of the funds. The first is that the applicant has not proved that any money was lost at the NYS, which in their view is a condition that must be satisfied before the respondents are called upon to answer. They assert that the applicant must show that there was a budgetary allocation to the NYS for the years in question; show the designated usage of the money, and finally, show that the money was diverted under the 1st respondent's watch and for her benefit. They submit further that the application is premised on the false presumption that it is an established fact that an offence was committed, but the applicant has failed to show that NYS had public monies which it then lost.

105. The provisions of section 92 of POCAMLA set out above, however, do not set such conditions for the making of a forfeiture order. On the contrary, the making of such an order is not dependent on the outcome of criminal proceedings or of an investigation with a view to instituting such proceedings. What is required is to show that a party has funds or assets which, on a balance of probabilities, are the proceeds of crime. Once the applicant establishes this, the onus is on the respondents to show that the funds or assets have a legitimate source.

106. In this case, the 1st respondent was the Principal Secretary, State Department of Public Service and Youth, in the Ministry of Public Service, Youth and Gender Affairs. She is what is referred to under Regulation 22 of the **Proceeds of Crime and Anti-Money Laundering**

Regulations, 2013 as a ***'politically exposed person.'*** The Regulation, which requires reporting institutions such as banks to have in place appropriate risk management systems to determine whether a customer or beneficial owner is a '*politically exposed person'* defines such a person as follows:

> **(3) In these Regulations, a politically exposed person means a person who has been entrusted with a prominent public function in a country or jurisdiction including—**
>
> **(a) members of Cabinet;**
>
> **(b) senior executives of state owned corporations;**
>
> **(c) important political party officials;**
>
> **(d) senior military officials and other members of the disciplined forces;**
>
> **(e) members of the Judiciary;**
>
> **(f) senior State Officers;**
>
> **(g) senior Public Officers;**
>
> **(h) senior Official of an International Organisation;**
>
> **(i) any immediate family member or close business associate of a person referred to under this subregulation; and**
>
> **(j) any other category of persons as the Centre may determine.** (Emphasis added)

107. Under section 33(4) of the Banking Act, the Central Bank is empowered to issue Guidance Notes to be adhered to by institutions in order to maintain a stable and efficient banking system. In compliance with this provision, the Central Bank issued the **Central Bank of Kenya Guidance Note: Conducting Money Laundering/ Terrorism Financing Risk Assessment (December 2017).** This Guidance Note echoes the definition of a **'***politically exposed persons'* set out in the POCAMLA Regulations which I have set out above.

108. The rationale behind the Regulations and Guidance Note, I I believe, is to ensure that banks are on the lookout for persons holding public or State offices who may (mis)use their positions to acquire public funds corruptly, or to engage in the kind of conduct that POCAMLA and similar legislation such as the Anti-corruption and Economic Crimes Act (ACECA) seek to curtail.

109. In this case, the NYS, which fell under the Ministry in which the 1st respondent was the PS, is alleged to have lost millions of public funds, and a number of persons, including the 1st respondent, have been charged with various offences related to the loss of these funds. The respondents concede tacitly in their submissions that indeed funds were lost at the NYS, submitting that suppliers in whose accounts funds from the NYS were allegedly deposited have been charged, and that the applicant should pursue these suppliers for recovery of the said funds and should not pursue the respondents who, with the exception of the 1st respondent, have not been charged with any offence. The respondents argue further that the respective banks in which the funds were deposited, which have a reporting obligation under POCAMLA, did not raise any flags on the respondents' banking behaviour.

110. I take judicial notice under section 60 of the Evidence Act, however, that in its Press Release dated 12th September 2018, the Central Bank of Kenya indicated the actions it had taken against banks which had failed to comply with the reporting obligations under POCAMLA. In the Press Release, titled **"NVESTIGATIONS OF BANKSRELATED TO NATIONAL YOUTH SERVICE TRANSACTIONS**

(https://www.centralbank.go.ke/uploads/press_releases

/104465402_Press%20Release%20-%20Investigations%20of%20Banks%20Related%20to%20National%20Youth%20Service%20Transactions.pdf) the Central Bank stated:

> **"The Central Bank of Kenya (CBK) has, with other investigative agencies, been investigating banks that were used by persons suspected of transacting illegally with the National Youth Service (NYS). This followed the serious concerns that came to light in May 2018, related to the channelling of NYS funds. CBK announces the conclusion of the first phase of the investigation of the banks that were used by these persons in transacting the NYS funds. The investigations prioritized banks that handled the largest flows, namely; Standard Chartered Bank Kenya Ltd, Equity Bank Kenya Ltd, KCB Bank Kenya Ltd, Co-operative Bank of Kenya Ltd, and Diamond Trust Bank Kenya Ltd. The main objective of the investigations was to examine the operations of the NYS-related bank accounts and transactions, and in each instance assess the bank's compliance with the requirements of Kenya's Anti-Money Laundering/Combating Financing of Terrorism (AML/CFT) laws and regulations."**

111. There had thus been a failure by the banks in which the respondents' accounts were held to comply with their statutory obligations under POCAMLA, and they were duly penalized by the Central Bank as the Press Release indicates.

112. The respondents concede in their submissions that the country has been battling the scourge of corruption. A consideration of the legislative intent behind POCAMLA shows that it is to deny those involved in corruption or crime, or those who benefit from such acts, whether directly or indirectly, from enjoying the tainted fruits of such corrupt or criminal acts. This is why, in my view, section 2 of POCAMLA defines *'proceeds of crime'* in such wide terms as to include 'any **property** or economic advantage **derived or realized**, directly or indirectly, **as a result of or in connection with an offence** irrespective of the identity of the offender…'

113. Section 92(4) of POCAMLA makes it clear that ***"The validity of (a forfeiture order) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.'*** The respondents have submitted that the applicant must show a *prima facie* commission of an offence that logically ties itself to the bank accounts the subject of this case. This, in my view, is not what the statutory provisions in section 92(4) demand from the applicant. The applicant has shown that investigations were undertaken in relation to loss of public funds from the NYS and criminal proceedings are ongoing against the 1st respondent and others. It has shown that the respondents have received in their accounts, in the period covered by the investigations and the criminal proceedings, funds in respect of which, according to the applicant, they have not been able to show a legitimate source. This is the basis on which the applicant has brought the present application, and it has thus established, on a balance of probabilities, that the respondents have funds which are suspected to be proceeds of crime.

114. An application under POCAMLA gives the respondents an opportunity, before the High Court, the court which is vested with jurisdiction to deal with such applications, to explain the source of their funds. The explanation proffered by the respondents is two-fold. First, it is their contention that the funds in issue are from produce from a farm owned by the 1st respondent and her husband, Dick Achieng Oneko, in Uyoma, Siaya. On this farm, according to the 1st respondent and her brother in law, Nam Oneko, they grow vegetables such as tomatoes and capsicums in greenhouses. The produce from these farm is then sold to middle men and '*Mama Mboga*', ordinary women who are vegetable vendors. The second source of the funds, according to the respondents, is the consultancy fees allegedly paid to the 1st respondent's husband for consultancy work done in South Sudan.

115. The question is whether the explanations given are sufficient to show a legitimate source of the large amount of funds in the accounts in issue. An analysis of the documents annexed to the 1st respondent's affidavit intended to demonstrate that the Uyoma farm is a legitimate source of the funds shows that they comprise what appear to be photocopies of receipts issued by 'Oneko Farms' for relatively small amounts paid for sale, mostly, of tomatoes. Single names of the alleged purchasers are indicated in the receipts, many with the date and month but no year indicated. Other documents comprise receipts from Amiran Kenya issued to Nam Oneko, it would appear for products purchased from Amiran. None of these documents, however, shows receipt of funds that could explain deposits of Kshs 500,000 or 900,000 on a single day.

116. I note, further, that the respondents did not produce any documents to show that they owned the farm in Uyoma. They did not produce any documents that showed that the funds in question were from produce from the farm. There were no documents to show that there were sales of the produce, and to whom. The amounts in the accounts were deposited in lump sums in excess of Kshs 500,000, but there is no evidence adduced by the respondents to show who made these deposits. There is also no evidence of payment of income tax by the respondents. All that there is are deposits in accounts held by the 1st respondent, her companies and her children. The deposits are all made in Nairobi, while the farm from which the produce was allegedly sold is in Siaya. The best that can be said about this limb of the respondents' argument is that there is a piece of land in Uyoma, Siaya, in which the 1st respondent and her husband may have an interest. Nothing has been placed before the court to show that the land is the source of the funds in the respondents' accounts.

117. The respondents complained that the applicant did not place photographs of the farm before the court. Photographs, however, would not show the economic viability of a farm. Such photographs as the respondents annexed to their affidavits do show farm produce, but there is nothing to show where the photographs were taken, or how such photographs of vegetables translate to deposits of thousands of shillings in a matter of days.

118. I reach this conclusion from an analysis of the deposits in the respondents' accounts. By way of illustration, I note that large deposits were made in the respondents' accounts on the same days as follows:

27th July 2016-Diamond Trust Bank

i. Account number **** in the name of SWM:Kshs 600,000

ii. Account number ****** in the name of SMK: Kshs 600,000

iii. Account number ********** in the name of SMM: Kshs 800,000 and 500,000

iv. Account number ********** in the name of LWM: Kshs 800,000

5th August 2017-Equity Bank

i. Account number ****** in the name of LIDI Estates Limited: USD 20,000/

ii. Account number **** in the name of LIDI Holdings Limited: USD 20,000

25th August 2017-Equity Bank

i. Account number ******** in the name of LWM:USD 10,000

ii. Account number ****** in the name of LIDI Estates Limited: Kshs 900,000/=

iii. Account number **** in the name of LIDI Holdings Limited: Kshs 900,000/=.

119. I note that Equity Bank and Diamond Trust Bank are among the five banks penalized by the Central Bank for failure to comply with their reporting obligations under POCAMLA. It is also worth noting, contrary to the submissions by the respondents, that some of the accounts into which the funds were deposited, such as the accounts held by LIDI Holdings Limited, were opened in August 2017. This company itself, as the certificate of incorporation exhibited by the applicant indicates, was incorporated on 3rd August 2017. It thus appears that these funds were the very first funds to be deposited in these accounts within the same week as the company was incorporated and the accounts opened.

120. Even were one to give the benefit of the doubt to the respondents, it is difficult to accept that these large sums of money are payments for the produce from the farm. It is not too much to expect that a person operating a legitimate business in agricultural or horticultural produce would have records of the sales and payments, as well as income tax returns that show the amount of produce, to whom the sales are made, the profits, if any, and tax paid thereon. In any event, as averred by the applicant, the total amount shown in the receipts annexed to the 1st respondent's affidavit in the period under investigation is Kshs 390,000, a far cry from the amount deposited and held in the respondents' accounts.

121. The second explanation given by the respondents is that some of the funds are from the 1st respondent's husband's consultancy business. An affidavit from one Micah Kigen in which he states that he paid the 1st respondent's husband Kshs 40,000,000 is annexed as evidence of such consultancy business. The evidential value of such a document, an annexure to another affidavit, is doubtful-see **Republic v Ministry of Health & 3 others Ex-parte Kennedy Amdany Langat & 27 others [2018] eKLR**.

122. In any event, I note from the affidavit of Cpl Nakitare that the applicant obtained orders to search the account into which the consultancy fees were allegedly paid. This was an account held by Nile International Limited at CFC Stanbic Bank, Westgate Branch (annexure IN1). An analysis of this account shows that the account had received an amount of approximately Kshs 22 million, and that the said amount had been withdrawn from the account. It also showed that in the period under investigation, being from 2015-2019, there had been no deposit of funds in that account.

123. The respondents have also alleged that the 1st respondent also had business ventures, properties and loans from which she obtained the funds deposited in the subject accounts. Such ventures would also have documentation to demonstrate their existence. What the respondents have presented is a handwritten statement by the 1st respondent as evidence of such ventures. Such a statement, however, is of no evidential value or assistance to the respondents.

124. Counsel for the respondents submitted that the applicant had sought forfeiture of all the funds in the accounts, without taking into account the monies earned by the 1st respondent from her employment in NEPAD and as PS. As submitted by the applicant, however, the arguments relating to the 1st respondent's salary was only raised at the submission stage from the Bar. In any event, the onus was on the respondents to show that the funds in the ten accounts were partly from the 1st respondent's pay from NEPAD, in which she served prior to joining the Ministry as PS in 2015. All in all, it is my finding that the respondents have not been able to show a legitimate source of the funds deposited in the ten accounts the subject of this application.

125. The applicant has placed before the court several decisions with regard to the consequences of failure by a party in the position of the respondents to demonstrate a legitimate source of funds held in its account. It cites the decision in **Assets Recovery Agency v Pamela Aboo; Ethics & Anti-Corruption Commission (Interested Party)[2018] eKLR**, an application for forfeiture in which the court stated that:

> **"I have done an analysis of the deposits above and shown how much was being deposited in a day or so for the Respondent. Even with all this, the Respondent has not attempted to explain the source of this money either through the replying or supplementary affidavit. It could be true that she does business with Samson Waweru, Jonathan Kimindu and her own business but where is the evidence.**
>
> **There is nothing that stopped Samson Waweru and other business partners from swearing affidavits to support her claims. If indeed Samson Waweru and Jonathan Kimindu were among the cash depositors based in Mombasa, could they not have come out to specifically state on oath when and how much they deposited" The Respondent did not support the claim that she gave Kshs 1 million to Samson Waweru. That sum of money must have come from somewhere if the allegation is anything to go by.**
>
> **Mr. Odoyo in his submissions has asked what law prohibits one from depositing money and if there is any offence in not withdrawing the same. My quick answer to that is that there is no law that prohibits one from depositing money and there is also no offence committed if one fails to withdraw their money. How was she running her business without making any withdrawals" Even as one fails to withdraw it must be shown how they are surviving.**
>
> **One is at liberty to deposit even a billion shillings but the person must be ready to share the source of such huge deposits with the relevant authorities. When no satisfactory explanation is forthcoming the court will take it that the same was not lawfully acquired".**

126. The court went on to conclude that:

> **"Where the person against whom allegations have been made does not give a satisfactory explanation to rebut the**

allegations, it means what has been presented is not challenged. In this case there is no explanation of the source of the huge deposits into the Respondent's accounts. Even a glance at the cash deposits made at Donholm branch of Equity Bank would call for an explanation by the Respondent as to who was making the deposits and for what purpose. The moment the Applicant established through the bank statements that there were huge cash deposits, the burden shifted to the Respondent to explain the source. A lot has been said about the Respondent's husband by both parties but this court is not using that information against the Respondent. The Respondent had a clear duty to explain the source or sources of these huge deposits into her account which she has failed to do".

127. Further, the applicant cites **Assets Recovery Agency v Pamela Aboo Miscellaneous Application No. 58 of 2017** where the court observed as follows:

"In her statement, the Respondent/Applicant states the funds in the various accounts were proceeds from her various businesses and the reason why she had never drawn on them, was that she was saving the funds to enable her to purchase a lorry for her various businesses. Ordinarily a business should have transactions which require money to come in and out of the business and this will be reflected in the bank account statement. I note that she has not demonstrated to the court that she relies on the said monies in the account to provide for her reasonable day to day living expenses. Freezing the account therefore will not deprive her of reasonable living expenses, since it is not an account she with draws money from. The statements on the relevant accounts show that she only made deposits and did not make any withdrawals. It is also noteworthy that although the Applicant submits that the funds were from her various businesses, she has not presented to the court any form of proof as invoices and payments from customers, or evidence of payments to suppliers for goods received or services rendered by her businesses, as proof of the existence of such business."

128. The respondents have sought to distinguish the above case on the basis that there were no withdrawals made by the respondent from the accounts, while there were withdrawals from their accounts. This, in my view, is a rather specious argument. As the analysis set out above shows, the respondents' accounts received substantial deposits within a very short time, between 2016 and 2018, in some cases a matter of days or weeks. There were some withdrawals, it is true, but these do not detract from the fact that the respondents have not shown a legitimate source of the sizeable deposits into their accounts.

129. The applicant has submitted that in money laundering schemes, criminals always create sophisticated complex schemes to camouflage and conceal the assets and benefits they derive from their criminal activities. Its submission is that in the present case, the 1st respondent has created a complex web of concealing the funds in issue by depositing the funds in bank accounts in the names of her family members and business entities. The applicant cites in support the case of **Schabir Shaik & Others v- State Case CCT 86/06(2008) ZACC 7** in which the court in defining proceeds of crime stated:

"…One of the reasons for the wide ambit of the definition of "proceeds of crime" is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of "camouflage".

130. In this case, the applicant opened numerous bank accounts in her name, her business name and in the names of limited liability companies in which she, her husband and daughter were the shareholders, and in the names of two of her minor children. She would deposit funds in these accounts, sometimes in all the accounts on the same day. This kind of conduct was anticipated by the law, hence the definition of 'politically exposed persons' to include children and close relatives of persons in the position of the 1st respondent.

131. I have also considered the decision cited by the applicant of **Assets Recovery Agency v Rohan Anthony Fisher, and & Others, Supreme Court of Jamaica, Claim No 2007 HCV003259** in which the court issued an order for the forfeiture of funds found to be proceeds of crime. While the respondents have sought to distinguish this case on the basis that the legal framework in Jamaica is different from the statutory regime obtaining in Kenya, I believe the fundamental principle that emerges from the case is applicable within our jurisdiction.

132. The principle is that once the applicant establishes on a balance of probabilities that the respondents have in their accounts funds for which they not been able to show a legitimate source, the onus is on them to satisfy the court that the assets and funds held in their accounts are not the proceeds of crime. In **Assets Recovery Agency –vs- Rohan Anthony Fisher, and & Others (supra)**, the court, in issuing an order for recovery of money found to be proceeds of crime, emphasized the evidential burden placed on a respondent to show the lawful source of the funds in issue and observed as follows:

"…Even though these proceedings are quasi criminal in nature there is an evidential burden of proof on the Defendant. It is incumbent on them to demonstrate evidentially how they lawfully came into possession of the assets seized. Miller for example merely says she worked/works as an higgler but has amassed thousands of United States dollars without more.

There is no indication of any work place or higglering or any enterprise on her part. The only reasonable and inescapable inference based on all the evidence, is that the properties seized are properties obtained through unlawful conduct and are therefore Recoverable Properties.

This court finds Applicants case proved and will make a Recovery Order in respect of the properties seized as per the Freezing Order dated the 14th August 2007.

This Court found that none of the monies from the freezer was the property of Delores Miller nor earned by her. The money was part of the proceeds of the criminal activities of her two sons, Rohan Anthony Fisher and Ricardo Fisher and as such are part of the recoverable assets…"

133. Thus, I believe that the first two issues that arise in this matter must be answered in the affirmative. The respondents have large sums of money deposited in their accounts which they have not been able to show a legitimate source in respect of. The only conclusion that can be arrived at is that the funds are proceeds of crime as defined in POCAMLA and are therefore liable to forfeiture to the State.

134. The respondents have contended that the funds in the ten accounts were from various sources including savings from the 1st respondent's employment salary and allowances part of which were deposited into the accounts; diverse activities in real estate, landholding and construction ventures, as well as mortgages and loans for investment in profit making ventures, the legitimate proceeds from which were directed into the subject bank accounts. As I have found above, there is no evidence that supports these contentions.

135. What I discern from the respondents' submissions is that since the applicant has not shown a direct link between the funds in the said accounts and the funds alleged to have been stolen from the NYS, the said funds are not proceeds of crime, and should therefore not be forfeited to the State. I take the view, however, that POCAMLA and the entire legal regime related to recovery of proceeds of crime and unexplained assets has the underlying premise that crime and corruption are undertaken in a labyrinthine, secretive manner; that funds and assets may not be directly traced to crime; that while investigations may be carried out, some alleged perpetrators charged and subjected to trial, a conviction may not result. Yet, the respondent may have in his or her possession substantial funds and assets, but is not able to show a legitimate source of the funds and assets.

136. The question is what, in such circumstances, should be the option? Is it to say, as the respondents ask the court to do, that there is no trail leading the funds to the suspected source, in this case the NYS funds? That the funds do not belong to the State just because the respondents cannot show a legitimate source? What would such a conclusion mean in relation to the tracing and recovery of, say, funds and assets derived from the narcotics trade, cyber-crime or piracy, or from trafficking in wildlife, or in persons?

137. I believe I would not be remiss if I asserted as an incontrovertible truth that money and assets are not plucked from the air or, like fruits, from trees. They can be traced to specific sources- salaries, businesses in which one sells specific items or goods, or provides professional services. There must be books of accounts, stock registers, local purchases orders and delivery notes showing to whom goods are sold, deliveries made and payment receipts showing from whom payment has been received.

138. For one to deposit, in different accounts, on the same days, hundreds of thousands of shillings or dollars-as happened in this case- there must be a very clear source of such funds. When the principal holder and depositer of the funds is a Principal Secretary in a State Department in which investigations have shown loss of millions in public funds, that person must have a very clear explanation for the source of her funds. If she does not, then the only conclusion possible is that the funds are proceeds of crime, of corruption, that insidious scourge that has reduced our society to penury.

139. In my view, the applicant has established that the funds in contention in this case are proceeds of crime, and they should be forfeited to the State.

Violation of the Respondents' Rights

140. The second issue for consideration is whether the making of forfeiture orders is in violation of the respondents' rights to property and the right to fair hearing.

141. With respect to the right to property, the respondents submit that the provisions of POCAMLA should not be used as a weapon to arbitrarily frustrate and defeat their private property rights guaranteed under Article 40 (1) and (2) of the Constitution. The applicant's response is that under the provisions of Article 40(6), the protection of the right to property does not extend to property found to have been unlawfully acquired. Article 40 of the Constitution provides that:

> **40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**
>
> > **(a) of any description; and**
> >
> > **(b) in any part of Kenya.**
>
> **(2) Parliament shall not enact a law that permits the State or any person—**
>
> > **(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**
> >
> > **(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**
>
> **(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**
>
> > **(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**
> >
> > **(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law….

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

(Emphasis added)

142. This court has had occasion to consider submissions similar to those made by the respondents in this case in **ACEC Appln. No. 7 of 2019 - Assets Recovery Agency v Joseph Wanjohi & Others.** In finding that the making of a forfeiture order does not violate the right to property, I took the following view:

"145. The applicant submits, on the authority of NDPP vs Rebuzzi (94/2000) ZASCA 127 which was quoted in the case of Schabir Shaik & Others –vs- State (supra) that the court should grant the said orders. In that case, the court had emphasised the objective of forfeiture orders as follow:

"….the primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realization that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order…"

147.The question is whether issuing an order of forfeiture amounts to unconstitutional deprivation of the right to property. In the case of Teckla Nandjila Lameck-vs- President of Namibia (supra) the court held that:

"….The reliance upon their rights to property protected under art 16 can also not in my view avail the applicants. This is because proceeds of unlawful activity would not constitute property in respect of which protection is available. These proceeds arise from unlawful activity which is defined to "constitute an offence or which contravenes any law…"

148. In Martin Shalli vs-Attorney General of Namibia (supra) it was held that:

"…the proceeds of unlawful activity would not constitute property in respect of which constitutional protection is available. This court in that matter further held that the protection of property under art 16 is in any event not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate purpose…

…I accordingly conclude that chapter 6 does not violate the right to property under article 16 of the Constitution because art 16 does not protect the ownership or possession of the proceeds of crime. I further reiterate the approach of the court in Lameck that even if chapter 6 were to infringe upon art 16, then it would in my view be a proportionate response to the fundamental problem which it addresses, namely that no one should be allowed to benefit from their wrongdoing and that a remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose…"

149. Our Constitution at Article 40 does protect the right to property. However, Article 40(6) is clear that such protection does not extend to illegally acquired property. Thus, property acquired, as the court has found in this case, from the proceeds of crime, is not protected. Making an order for its forfeiture does not therefore violate the right to property."

143. I take the same view of the present matter. The respondents have millions of funds in their accounts which this court has found they are not able to show a legitimate source in respect of. Such funds are, accordingly, the proceeds of crime. Making an order for the forfeiture of such funds does not amount to violation of their right to property under Article 40.

Violation of the Right to Fair Hearing

144. Similarly, I am unable to find violation of the right to access to justice and hearing in respect of the respondents. With respect to the right to a hearing, the respondents submit that the applicant is required to provide proof of the alleged illegality in an open and public hearing by a court of competent jurisdiction as required by Article 25 (c), 48 and 50 (1) of the Constitution. In their view, since no crime of receiving property or deriving economic benefit is alleged or demonstrated by evidence against them, no punishment can issue against them.

145. However, I did not hear the respondents to argue that this court is not a court of competent jurisdiction. Their argument seems to be that it is only the criminal court that can determine whether or not they hold funds which are the proceeds of crime. However, it must be reiterated that the present application is an application for civil forfeiture. It is a process expressly provided for by Part VIII of POCAMLA. It is not dependent on the outcome of a criminal prosecution or investigation. There is thus no violation of the right to hearing.

Whether a Conviction is a Condition Precedent to the Making of a Forfeiture Order

146. The last issue for consideration is whether a conviction in a criminal trial, as submitted by the respondents, is a condition precedent to the making of a forfeiture order under Part VIII of POCAMLA. My consideration of the provisions of this part, particularly section 92(4) thereof as well as judicial precedents on the question leads me to the conclusion that this final issue must be determined in the negative: a conviction is not a precondition for civil proceedings under Part VIII of POCAMLA, or for the making of a forfeiture order. Under section 92(4) of POCAMLA, it is expressly provided that:

> **(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.**

147. The issue has also been considered in several decisions, both from this jurisdiction and in other jurisdiction whose determinations are persuasive authority. In its decision in **Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR** the court stated that:

> **"This is a claim for civil recovery. A claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct. The Plaintiff herein is therefore not required to prove that the Defendant actually committed an act of corruption in order to invoke the provisions of the ACECA. In the case of Director of Assets Recovery Agency & Ors, Republic versus Green & Ors [2005] EWHC 3168, the court stated that: "In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained." I opine that forfeiture is a fair remedy in this instance as it serves to take away that which was not legitimately acquired without the stigma of criminal conviction. Criminal forfeiture requires a criminal trial and conviction while civil forfeiture is employed where the subject of inquiry has not been convicted of the underlying criminal offence, whether as a result of lack of admissible evidence, or a failure to discharge the burden of proof in a criminal trial. See - Kenya Anti-Corruption Commission v James Mwathethe Mulewa & another [2017] eKLR."** (Emphasis added).

148. In its decision in **Assets Recovery Agency vs Pamela Aboo** (supra), the court considered the issue in relation to the civil proceedings for forfeiture before it and observed as follows:

> "63. Forfeiture proceedings are Civil in nature and that is why the standard of proof is on a balance of probabilities. See section 92(1) of POCAMLA. In the case of **Director of Assets Recovery and Others, Republic vs Green & Others [2005] EWHC 3168** the court stated as follows:
>
> **"In civil proceedings for recovery under part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matter that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained."**
>
> 64. The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Respondent where presumption of innocence is applicable. In the case of **ARA & Others vs Audrene Samantha Rowe & Others Civil Division claim No 2012 HCV 02120** the Court of Appeal stated:
>
> **"....that in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the convicting of any individual and thus there was no reason to apply the criminal standard of proof.,.."**

149. In the Namibian case of **Teckla Nandjila Lameck-vs- President of Namibia 2012(1) NR 255(HC)** the court stated that:

> **"…Asset forfeiture is, as is stated in 50 of POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the State to invoke whether or not there is a criminal prosecution.**
>
> **…even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of crime and not at the person having possession of them. This is in furtherance of the fundamental purpose of these procedures referred to above."**
>
> See also **Martin Shalli –vs -Attorney General of Namibia & Others High Court of Namibia Case No: POCA 9/2011.**

150. Finally, in **Serious Organized Crime Agency vs Gale** quoted in the case of **Assets Recovery Agency & Others –vs- Audrene Samantha Rowe & Others Civil Division Claim No 2012 HCV 02120** it was held that:

> **"…in deciding whether the matters alleged constituted unlawful conduct when a civil recovery order is being made is to be decided on a balance of probability. Civil recovery proceedings are directed at the seizure of property and not the conviction of any individual and thus there was no reason to apply the criminal standard of proof…"**

151. I agree with and I am duly guided by the holdings in the above matters. It is my finding and I so hold that a criminal conviction is not a condition precedent to the making of an order for civil forfeiture under Part VIII of POCAMLA.

Disposition

152. The upshot of my findings on the issues above is that the application dated 24th December 2018 succeeds. I accordingly allow the application and grant the following orders:

> **1. A declaration be and is hereby issued that a total of USD 105,293.7 and Kshs 22, 445, 487.74 held in bank accounts Numbers ******** and ****** in the name of LWMM T/A Sahara Consultants, Lidi Holdings Limited, Lidi Estates Limited, SMM, SWM and SMK at Equity Bank Limited, Community Branch Nairobi and Diamond Trust Bank Limited, Capital Centre and Villages Market Branches are proceeds of crime and therefore liable for forfeiture to the State.**
>
> **2. An order be and is hereby issued forfeiting the following funds to the government and transferring the said funds to the applicant:**
>
> > **i. USD 67, 331.9 held in Account number ***** in the name of lWMM trading in the business name of Sahara Consultants held at Equity Bank Limited, Community Branch, Nairobi;**
> >
> > **ii. USD 28, 981.97 held in account number 0180273781178 in the name of LIDI Estates Limited held at Equity Bank Limited Community Branch, Nairobi;**
> >
> > **iii. Kshs 2,297,495.00 held in account number **** in the name of LIDI Estates Limited at Equity Bank Limited, Community Branch, Nairobi;**
> >
> > **iv. Kshs 257,220 held in account number 0180273780467 in the name of LIDI Holdings Limited held at Equity Bank Limited, Community Branch, Nairobi;**
> >
> > **v. USD 8,979.83 held in account number 0180273780412 in the name of LIDI Holdings Limited held at Equity Bank Limited Community Branch, Nairobi;**
> >
> > **vi. Kshs 1,685,430.84 held in Account number ***** in the name of LWMM trading in the business name of Sahara Consultants held at Equity Bank Limited, Community, Branch Nairobi;**
> >
> > **vii. Kshs 5,653,431.89 held in Account number ******* in the name LWMM trading in the business name Sahara Consultants held at Diamond Trust Bank Limited, Capital Centre Branch Nairobi;**
> >
> > **viii. Kshs 2, 903, 996.71 held in Account number ********** in the name of SMM held at Diamond Trust Bank Limited, Village Market Branch Nairobi;**
> >
> > **ix. Kshs 4, 788,763.59 held in account number ******* in the name of SMK held at Diamond Trust Bank Limited, Village Market Branch, Nairobi;**
> >
> > **x. Kshs 4, 859,169.71 held in account number ******** in the name of SWM held at Diamond Trust Bank Limited Capital Centre Branch, Limited.**

153. The costs of the application shall be borne by the respondents.

154. Orders accordingly.

Dated and Delivered at Nairobi this 15th day of April 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent and pursuant to a notice issued on 8th April 2020. The parties have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

MUMBI NGUGI

JUDGE